Ex parte Wang

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THIS OPINION WAS NOT WRITTEN FOR PUBLICATION

The opinion in support of the decision being entered today (1) was not written for publication in a law journal and (2) is not binding precedent of the Board.

Paper No. 16

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte JAW KAI WANG

Appeal No. 95-4888
Application 08/047,488[1]

ON BRIEF

Before CALVERT, LYDDANE and STAAB, Administrative Patent Judges.

LYDDANE, Administrative Patent Judge.

ON REQUEST FOR RECONSIDERATION

This is in response to a request for reconsideration of our decision dated October 30, 1995, wherein we affirmed the examiner's decision rejecting claim 13 under 35 USC 103. We have carefully considered the arguments advanced by the appellant but we find nothing therein to convince us that our decision was in error.

[1] Application for patent filed April 19, 1996.

In response to appellant's comments as to how this panel of the Board should evaluate the patentability of appellant's invention, we note that in arriving at our earlier decision that the evidence applied by the examiner was sufficient to establish a prima facie case of obviousness with respect to appealed claim 13, we recognized that "[a] prima facie case of obviousness is established when the teachings from the prior art itself would appear to have suggested the claimed subject matter to a person of ordinary skill in the art." In re Bell, 991 F.2d 781, 782, 26 USPQ2d 1529, 1531 (Fed. Cir. 1993) (quoting In re Rinehart, 531 F.2d 1048, 1051, 189 USPQ 143, 147 (CCPA 1976)). We also took into account that our reviewing court has cautioned against focussing on the obviousness of the differences between the claimed invention and the prior art rather than on the obviousness of the claimed invention as a whole as § 103 requires. See, e.g., Hybritech Inc. v. Monoclonal Antibodies, Inc., 802 F.2d 1367, 1383, 231 USPQ 81, 93 (Fed. Cir. 1986), cert. denied, 480 U.S. 947 (1987). Thus, in arriving at our earlier decision, we certainly considered appellant's invention as a whole and applied the test for obviousness set forth in In re Young, 927 F.2d 588, 592, 18 USPQ2d 1089, 1092 (Fed. Cir.

1991) and In re Keller, 642 F.2d 413, 425, 208 USPQ 871, 881 (CCPA 1981)[2].

With respect to the patent to O'Sullivan, appellant now argues that this reference "clearly teaches a single bed: 'which is a single layer'; column 1, line 67; column 2, line 5; column 3, lines 26, 40; and claim 1" (page 2 of the request). While we would agree that O'Sullivan discloses "a bed of discrete oysters" (column 2, line 5 and claim 1, line 2), we find nothing in the specification of O'Sullivan to indicate that such bed is a single layer as now argued. Moreover, we do not find the quote "which is a single layer" at any of the places in the specification of O'Sullivan cited by appellant, nor did a review of the specification of O'Sullivan reveal any such quote or any reference whatsoever to a "single layer" with respect to the invention of O'Sullivan. Clearly, O'Sullivan discloses a vertically fluidized bed wherein a bed of discrete oysters, i.e.,

[2]The test for obviousness is not whether the features of a secondary reference may be bodily incorporated into the structure of the primary reference; nor is it that the claimed invention must be expressly suggested in any one or all of the references. Rather the test is what the combined teachings of the references, when taken as a whole, would have suggested to those of ordinary skill in the art.

> separate individual oysters which are unattached to any cultch particle or are attached to separate small particles of cultch which are less than 400 microns in size [column 2, lines 24-27],

which bed is placed in a vessel through which a stream of culture medium is caused to flow upwardly at a rate to maintain the oysters in the bed "in a state of incipient suspension" as set forth in column 2, lines 4 through 11. The fact that such a bed of discrete oysters is not a single layer is made more clear by the disclosure in lines 3 through 13 of column 3 which discusses a nutrient flow rate that causes suspension of the oysters resulting in a "bed condition" where "the pressure exerted by the upper oysters on the lower if the bed were static is reduced" [column 3, lines 9 and 10, emphasis added].

Appellant also asserts in the request that O'Sullivan neither teaches nor suggests providing a source of shrimp pond water for feeding the mollusks or flow control means for regulating flow of the shrimp pond water upward within the fluidized bed. Appellant states that

> O'Sullivan supplies a saline medium that has been synthesized with the addition of substances deemed beneficial to the growth of the mollusks. However, that has nothing to do with the naturally enriched medium obtained from the shrimp pond. [page 3 of the request].

Clearly, O'Sullivan discloses that a fluidized bed of oysters is fed by "a stream of a culture medium" which flows upwardly through the bed (column 2, lines 6-8) and that the oysters "are dependent on the nutrients being presented to them by means of the flow of the medium across them (column 2, lines 37-39). Admittedly, O'Sullivan does not specifically identify the source of the nutrients in the culture medium, and in particular, does not indicate that the nutrient source is shrimp pond water. However, O'Sullivan does clearly state that (column 3, lines 32-36)(emphasis added):

> [i]t is important, for the reasons given above, that means are provided for control of the flow of the culture medium; conveniently this takes the form of a pump operated with a constant head which head can be varied depending on the size of the oysters in the bed.

Thus, O'Sullivan clearly discloses flow control means for regulating flow of culture medium upwardly through the fluidized bed.

Additionally, as we stated on page 5 of our earlier decision,

> [a]lthough we recognize that the culture medium of O'Sullivan is not disclosed as being from shrimp pond water, we note that algae-rich water is known in the art as a culture medium for the production of oysters (see appellant's discussion of prior art Figure 1 on pages 9 and 10 of appellant's specification as originally filed). It is our opinion that the artisan

> of ordinary skill would have found it obvious to utilize a known source of algae-rich culture medium, such as shrimp pond water, as the culture medium in the production facility of O'Sullivan.

We observe that appellant has not taken issue with the above statements, and it is clear from appellant's disclosure of prior art that pond water is the source of the algae-rich water referred to above. Merely selecting the type of pond water to be shrimp pond water as the nutrient source would have been within the level of ordinary skill in the art.

We reiterate from our earlier decision that the question of obviousness cannot be approached on the basis that an artisan having ordinary skill would have known only what was read in the reference, because such artisan must be presumed to know something about the art apart from what the references disclose. See In re Jacoby, 309 F.2d 513, 516, 135 USPQ 317, 319 (CCPA 1962). Furthermore, a conclusion of obviousness may be made from common knowledge and common sense of the person of ordinary skill in the art without any specific hint or suggestion in a particular reference. See In re Bozek, 416 F.2d 1385, 1390, 163 USPQ 545, 549 (CCPA 1969). Moreover, the law presumes skill on the part of the artisan rather than the converse. See In re Sovish, 769 F.2d 738, 742, 226 USPQ 771, 774 (Fed. Cir. 1985).

Thus, we remain convinced that the examiner's rejection of appealed claim 13 under 35 USC 103 is proper.

Accordingly, the request for reconsideration is granted to the extent that our decision has been reconsidered but is denied with respect to making any changes therein.

DENIED

IAN A. CALVERT
Administrative Patent Judge

WILLIAM E. LYDDANE
Administrative Patent Judge

LAWRENCE J. STAAB
Administrative Patent Judge

BOARD OF PATENT APPEALS AND INTERFERENCES

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